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Taking the Direct File Statute to Criminal Court: Immigration Consequences for Juveniles

Marlon J. Baquedano

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Florida is one of fifteen jurisdictions in the United States that have enacted a direct file statute that grants prosecutors the ability to transfer juveniles from the juvenile justice system to adult court. Critiques of the direct file statute have focused on its effectiveness on deterrence and recidivism, its arbitrariness in application, and the tension with the role of juvenile justice in reforming rather than punishing youth. This Note explores the harmful consequences of the direct file statute on non-citizen youth in immigration proceedings and the probability of obtaining immigration relief. An adult conviction as opposed to a juvenile delinquency adjudication is grounds for immigration proceedings and also bars to relief such as Special Immigration Juveniles Status. Additionally, the greater cooperation between local law enforcement in adult jail systems and Immigration Customs Enforcement increases the likelihood that juveniles with adult convictions will face immigration proceedings as a result of their immigration status.

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I. INTRODUCTION

Brian was 17 years old when he and several of his friends found a BB gun[1] while they were walking on the beach.[2] Brian picked up the BB gun brandished it and used it to threaten a homeless couple that he and his friends had encountered after encouragement from his friends.[3] The group left with Brian never pulling the trigger and nobody being injured.[4] "The couple called the police and reported that they had been robbed at gunpoint" and described the perpetrators.[5] "Later that evening, Brian was arrested for stealing a motorized grocery cart from a supermarket, a crime which he was later able to prove he did not commit."[6] The police noticed that Brian matched the description for the crime against the homeless couple and he was also charged with that crime.[7] Prosecutors charged Brian under the direct file statute for both of these crimes.[8] Prosecutors charged Brian with attempted armed robbery with a firearm or other deadly weapon, a first degree felony punishable by up to 30 years in prison and grand theft for the grocery cart incident which carried a 5-year maximum sentence in adult court.[9] This meant that Brian was facing a maximum sentence of 65 years in prison and a minimum of 10 years in prison under Florida's "10-20-life" statute.[10]

Brian's case highlights a few of the critiques of the direct file statute in Florida. The juvenile justice system was founded with the fundamental goal to serve and reform minors who have trouble with criminality. The juvenile justice system assumes an understanding that youth possess different needs than adults, are less culpable, and more amenable to positive change. However, the direct file statute undermines this

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1 "BB guns" are a type of air gun designed to fire spherical projectiles similar to shot pellets.

2 BRANDED FOR LIFE: FLORIDA'S PROSECUTION OF CHILDREN AS ADULTS UNDER ITS "DIRECT FILE" STATUTE, HUMAN RIGHTS WATCH 1, 67 (2014), https://www.hrw.org/report/2014/04/10/branded-life/floridas-prosecution-children-adults-under-its-direct-file-statute [hereinafter BRANDED FOR LIFE].

3 *Id.*

4 *Id.* at 68.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*at 68.

10 *Id.*

traditional goal of the juvenile justice system; it is contrary to the rehabilitation of juveniles by imposing adult punishment.

Some of the scholarship has studied the effects of sentencing outcomes of juveniles waived to criminal court, whether transferred juveniles were sentenced to incarceration or probation, and how long their sentences were.[11] For example, after controlling for all legal and extralegal factors, juveniles waived to criminal court were sentenced to longer sentences than young adults between the ages of eighteen and twenty-four who were sentenced over the same time period.[12]

Other literature has assessed the specific deterrent effect of waiver laws by comparing the difference in recidivism rates between transferred youth and similarly situated juvenile offenders.[13] The literature has found that recidivism rates have generally been lower for youth retained in juvenile court when compared to youth transferred to criminal court.[14] Transferred juveniles also tend to re-offend sooner and more often than those youth processed in the juvenile system.[15] In Florida, in particular, where the vast majority of cases transferred to criminal court are waived by direct filing,[16] studies have found that this type of waiver does not have a deterrent effect on the juvenile offenders transferred to adult criminal court.[17] A study encompassing the jurisdictions with a direct file

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[11] *See, e.g.*, Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 296–97 (1991); Donna M. Bishop et al., *Prosecutorial Waiver: Case Study of a Questionable Reform*, 35 CRIME & DELINQUENCY 179, 191–94 (1989); Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, 1 YOUTH VIOLENCE & JUV. JUST. 128, 132–34 (2003).

[12] Megan C. Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 42 CRIMINOLOGY 485, 499–500 (2004).

[13] *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Deliquency?*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2010).

[14] *See, e.g.*, Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, SOURCEBOOK: SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS 248, 249–50 (1995); David L. Myers, *The Recidivism of Violent Youths in Juvenile and Adult Court: A Consideration of Selection Bias*, 1 YOUTH VIOLENCE & JUV. JUST. 79, 90 (2003).

[15] Fagan, *supra* note 5, at 249–51; Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 CRIME & DELINQUENCY 548, 555–56 (1997).

[16] *Delinquency Profile FY 2014–15*, FLORIDA DEPARTMENT OF JUVENILE JUSTICE, http://www.djj.state.fl.us/research/delinquency-data/delinquency-profile/delinquency-profile-dashboard [hereinafter *Delinquency Profile FY 2014–15*].

[17] *See, e.g.*, Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQUENCY 171, 177 (1996); Jeffrey A. Butts & Daniel P. Mears, *Reviving Juvenile Justice in a Get-Tough Era*, 33 YOUTH & SOC'Y 169, 177 (2001).

statute found that direct file waiver laws have had little effect on violent juvenile crime.[18]

This Note argues that the direct file statutes—and in particular the direct file statute in Florida[19]— has unexplored negative consequences in immigration proceedings and possible immigration relief for non-citizen youth with adult criminal convictions. Delinquency adjudications for juveniles are not considered convictions for removal proceedings, whereas criminal convictions are convictions and therefore trigger automatic removal proceedings.[20] This problem is compounded by increased local law enforcement cooperation with Immigration and Customs Enforcement (ICE) through programs such as ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS).[21] Furthermore, because of the stigma of a criminal record and the lack of resources in representation of non-citizen youth in immigration proceedings, this group seems to be entirely invisible.[22]

Part I of this Note explores the historical background to the increased use of different juvenile transfer laws and the direct file statute in Florida. Part II addresses the way juveniles are viewed in immigration proceedings, both when they only have juvenile delinquency adjudications, and when they have adult criminal convictions. Part III will analyze the way that local law enforcement cooperation with ICE makes juveniles with adult convictions particularly susceptible to immigration proceedings and to the loss of possible immigration relief for which they could have otherwise qualified without adult criminal convictions.

II. JUVENILE WAIVER LAWS AND THE DIRECT FILE STATUTE IN FLORIDA

In *Kent v. United States*, the United States Supreme Court established a process in which to waive juveniles to adult court.[23] The Court held that the decision to waive a juvenile to adult court required

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[18] Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance*, 96 J. OF CRIM. LAW & CRIMINOLOGY 1451, 1467 (2006).

[19] FLA. STAT. § 985.557 (2015).

[20] *See In re* Devison, 22 I. & N. Dec. 1362, 1370 (B.I.A. 2000).

[21] Immigr. and Customs Enf't, *Fact Sheet: ICE Agreements of Cooperation in Communities to Enhance Safety and Security* (2008) [hereinafter *ICE ACCESS*].

[22] *See* Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE FORUM FOR LAW & SOC. CHANGE 63, 81 (2011).

[23] Kent v. United States, 383 U.S. 541 (1966).

providing the minor with basic due process including a waiver hearing.[24] A year later, in the case of *In re Gault*, the Court held that children facing delinquency prosecution have many of the same legal rights as adults in criminal court: right to counsel, right to notice, right to cross-examination of witnesses, and the privilege against self-incrimination.[25] The transition to a more punitive juvenile justice system continued to progress through the 1970s with states lowering the age of majority in criminal proceedings so that certain juveniles could be prosecuted as adults[26] and through the waiver of juveniles to adult court. By 1994, the "number of juveniles waived to adult court reached 11,700."[27] This more punitive justice system included "transfer provisions to adult court, giving courts expanded sentencing powers, modifying confidentiality laws designed to shield juvenile offenders from stigma, and increasing the role of the victim in the juvenile justice process."[28] This movement to more punitive measures and the national trend to transfer more juveniles to adult court came in part as a response to an increase in juvenile crime and a steep rise in overall crime rates in the United States.[29]

There are three main categories of juvenile waivers to adult court.[30] The first category is judicial waivers, which refer to the cases that fall within the specified criteria of the court, such as the age of the offender, offense category, previous record, or some combination of the three, that the judge will consider in deciding to transfer the offender to adult court.[31] The three types of judicial waivers are discretionary, presumptive, and mandatory.[32] In a discretionary waiver, "the judge has the discretion to waive the case to adult court."[33] In a presumptive waiver, the "juvenile assumes the burden of proof to show why she should not be transferred to adult criminal court."[34] Finally, mandatory waivers apply to situations in which juvenile cases that meet particular age, offense, or other criteria must be transferred to adult court.[35]

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24 *Id*. at 561–62.

25 In re Gault, 387 U.S. 1 (1967).

26 Jodi K. Olson, *Waiver of Juveniles to Criminal Court: Judicial Discretion and Racial Disparity*, 2 JUST. POL'Y J. 1, 5 (2005).

27 *Id*. at 6 (citing JEFFREY FERRO, LIBRARY IN A BOOK: JUVENILE CRIME (2003)).

28 *Id*.

29 National Center for Juvenile Justice, *Juvenile Arrest Rates by Offense, Sex, and Race (1980–2010)*, U.S. DEP'T OF JUST. (2010), www.ojjdp.gov/ojstatbb/crime/excel/jar_2010.xls.

30 JAMES HOUSTON & SHANNON M. BARTON, JUVENILE JUSTICE: THEORY, SYSTEMS, AND ORGANIZATION 360 (Frank Mortimer, Jr. et al. eds., 2005).

31 *Id*. at 360–61.

32 *Id*. at 361.

33 *Id*.

34 *Id*.

35 *Id*.

The second waiver category is statutory exclusion waivers.[36] This waiver statutorily excludes any category of cases from the jurisdiction of juvenile courts.[37] The third waiver category is the direct file waiver.[38] Direct file waivers are often referred to as prosecutorial waivers because the prosecutor is responsible for determining whether a particular case should be tried in juvenile court or waived to adult court.[39] With judicial waivers, "judges have the most discretion whereas in the direct file waiver, the prosecutor decides whether the case should be processed in the juvenile or adult court system."[40] Currently, fifteen jurisdictions have a direct file statute, including Florida.[41]

Florida transfers more children out of the juvenile justice system and into adult court than any other state: in the period between 2003 and 2008, more than 12,000 juvenile crime suspects were transferred to adult court.[42] Florida charged children as adults at a rate of 164.7 per 100,000 juveniles in that same time period, almost twice the rate of Oregon, which had the second highest rate.[43] Nearly 98 percent of juveniles transferred to adult court are transferred pursuant to Florida's direct file statute.[44] The direct file statute gives prosecutors wide discretion to transfer a great number of juvenile cases to adult court with no involvement by a judge.[45] Furthermore, the direct file statute is not

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[36] Steiner & Wright, *supra* note 18, at 1454.

[37] PATRICIA TORBET ET AL., TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS, NATIONAL CENTER FOR JUVENILE JUSTICE (1998), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

[38] HOUSTON & BARTON, *supra* note 30, at 361.

[39] *Id*.

[40] Olson, *supra* note 26, at 10.

[41] BRANDED FOR LIFE, *supra* note 2, at 17. The other jurisdictions that have direct file statutes are: Arizona (ARIZ. REV. STAT. ANN. §§ 13-501, 13-504, 8-302 (2016), Arkansas (ARK. CODE ANN. § 9-27-318 (2016)), California (CAL. WELF. & INST. §§ 707(d)(1) & (3), 707(d)(2) (2016)), Colorado (COLO. REV. STAT. §§ 19-2-517, 19-2-518 (2016)), District of Columbia (D.C. CODE § 16-2307 (2016)), Georgia (GA. CODE. ANN. §15-11-28 (2016)), Louisiana (LA. CHILD. CODE ANN. art. 305 (2016)), Massachusetts (MASSACHUSETTS GEN. LAWS ch. 119, §§ 54, 72B, 74 (2016)), Michigan (MICH. COMP. LAWS § 600.606 (2016)), Montana (MONT. CODE ANN. § 41-5-206 (2016)), Nebraska (NEB. REV. STAT. § 43-276 (2016)), Oklahoma (OKLA. STAT. tit. 10A, §§ 10A-2-5-201-10A-2-5-208 (2016)), Vermont (VT. STAT. ANN. tit. 33, §§ 5201-5204a (2016)), Virginia (VA. CODE ANN. §16.1-269.1 (2016)), and Wyoming (WYO. STAT. ANN. § 14-6-203 (2016)).

[42] PATRICK GRIFFIN, ET AL., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE 1, 18 (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf [hereinafter *Trying Juveniles as Adults*].

[43] *Id*.

[44] BRANDED FOR LIFE, *supra* note 2, at 2; *see also* FLA. STAT. § 985.557 (2011), *amended by* 2016 Fla. Sess. Law Serv. Ch. 2016-7 (West).

[45] BRANDED FOR LIFE, *supra* note 2, at 2.

limited to the most serious cases: more than 60 percent of the juveniles transferred to adult court were charged with nonviolent felonies and only 2.7 percent were prosecuted for murder.[46] Additionally, the discretion carried by prosecutors is exercised differently in different judicial circuits in Florida with evidence that racial and ethnic biases affect that exercise of discretion with respect to certain crimes and certain groups.[47]

Moreover, the discretionary waiver hearings required of juvenile court judges to transfer juveniles to adult court in which they must consider several factors are not present with direct filing.[48] In Florida, the discretionary waiver statute requires the juvenile court judge to consider factors such as the seriousness of the offense, the child's prior record, and the child's amenability for rehabilitation in deciding to transfer the child to adult court.[49] The judge will hear from the defense attorney, the Department of Juvenile Justice, the child's parents or guardians, the child herself, and the state attorney[50] to help make the decision whether to transfer the minor to criminal court. If the judge decides to transfer the child, the decision must be in writing and can be appealed.[51] Under the direct file statute the prosecutor's decision is made without any oversight from the juvenile court or criminal court.[52] Furthermore, the statute does not provide guidance as to what factors prosecutors should consider in making the decision to charge a minor directly in court.[53] There "is no hearing, no evidentiary record, and no opportunity for defendants to test the basis for a prosecutor's decision to proceed in criminal court."[54] Florida also has mandatory provisions requiring charging certain cases directly in adult court.[55] The direct file statute therefore "sweeps whole categories into criminal court without much individualized consideration."[56]

The four circumstances listed in the mandatory provisions in which the prosecutor is required to direct file a child to criminal court are: any sixteen or seventeen year old who is charged with a violent crime against a person who was previously adjudicated, or found guilty, of "the commission of, attempt to commit, or conspiracy to commit murder,

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46 *Id*.
47 *Id*.
48 *See* § 985.556(4).
49 *Id*.
50 *See* § 985.556(4)(d).
51 FLA. STAT. § 985.556(4)(e) (2015).
52 BRANDED FOR LIFE, *supra* note 2, at 18.
53 *See* FLA. STAT. § 985.557 (2015)., *amended by* 2016 Fla. Sess. Law Serv. Ch. 2016-7 (West).
54 TRYING JUVENILES AS ADULTS, *supra* note 37, at 5.
55 FLA. STAT. § 985.557(2) (2015).
56 TRYING JUVENILES AS ADULTS, *supra* note 37, at 5.

sexual battery, armed or strong-armed robbery, carjacking, home invasion robbery, aggravated battery, or aggravated assault;"[57] any sixteen or seventeen year old charged with a forcible felony[58] who has three prior felony adjudications in juvenile court; any child of any age who is accused of any crime involving theft of a motor vehicle "and while the child was in possession of the stolen motor vehicle the child caused serious bodily injury to or the death of a person who was not involved in the underlying offense;"[59] and any sixteen or seventeen year old who is charged with committing certain crimes while in possession of a weapon or other destructive device.[60] Despite these provisions, the statute also provides that the prosecutor may keep any case in juvenile court at any time if she "has good cause to believe that exceptional circumstances exist that preclude the just prosecution of the child in adult court."[61] There is no definition or guidance as to what might qualify as "exceptional circumstances."[62] Furthermore, prosecutors must charge a child in adult court when she was previously charged and sentenced as an adult under the "once an adult, always an adult" provision of the direct file statute.[63] This means that no matter how minor an offense, once a child has been sentenced as an adult previously, that child will automatically be tried in adult court for a subsequent offense.[64] While Florida is not the only state with a "once an adult, always an adult" provision, it is one of only three jurisdictions that automatically treat a child as an adult for any subsequent offense.[65]

Florida gives prosecutors the discretion to charge a fourteen year old in adult criminal court for some offenses and may choose to prosecute

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57 FLA. STAT. § 985.557 (2015).

58 § 776.08 (2015) (defining forcible felony as: "treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.").

59 § 985.557 (2015).

60 § 985.557(2)(d); FLA. STAT. § 775.087(2)(a) 1. a–q (2015) (listing the specific crimes as: murder; sexual battery; robbery; burglary; arson; aggravated assault; aggravated battery; kidnapping; escape; aircraft piracy; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; unlawful throwing, placing, or discharging of a destructive device or bomb; carjacking; home-invasion robbery; aggravated stalking; and drug trafficking.).

61 FLA. STAT. § 985.557 (2015).

62 *Id*.

63 § 985.557(3).

64 § 985.557(3)(a) (2015).

65 *See* D.C. CODE ANN. § 16-2307(h) (West 2010); OKLA. STAT. ANN. tit. 10A §§ 10A-2-2-403(C), 10A-2-5-204(G), 10A-2-5-205(B) (West).

any juvenile starting at sixteen years old for any felony.[66] The statute also allows prosecutors to charge minors accused of misdemeanors as adults under certain circumstances.[67] The discretionary provision of the direct file statute allows prosecutors to file charges directly against any child aged sixteen or older in adult court "when in the state attorney's judgment and discretion the public interest requires that adult sanctions be considered or imposed."[68] Children sixteen years or older charged with a misdemeanor may be tried in adult court if they have had two prior delinquency adjudications or adjudications withheld,[69] of which one was for an act that would be considered a felony in criminal court.[70] The statute allows prosecutors to directly charge fourteen and fifteen year old minors in adult court for any of the nineteen enumerated felonies.[71] California is the only state with a longer list of felonies that make a fourteen-year-old eligible for adult court.[72]

The average percentage of juveniles who are arrested in Florida and have their cases transferred to criminal court has remained constant.[73] Despite the overall number of transfers decreasing, due to a decrease in the overall number of youth entering the juvenile justice system, the rate has remained steady.[74] Over the last five years, 2.44 percent of juvenile (ages 10-17) arrests were transferred to adult court.[75] Most of the felony offenses for which minors were transferred in the same time period include: burglary at 30.4 percent, armed robbery at 13.6 percent, aggravated assault/battery at 11.79 percent, drug violations at 6.1 percent, and misdemeanors at 5.37 percent.[76] The vast majority (94%) of children charged in adult court are boys[77] and in terms of overall arrests, male minors are transferred over thirteen more times than females with

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66 FLA. STAT. § 985.557(2) (2015).
67 § 985.557(1)(b).
68 *Id.*
69 § 985.35(4)(a).
70 § 985.557.
71 *Id.* (those felonies are: arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated assault; aggravated stalking; murder; manslaughter; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary and related offenses; aggravated battery; any lewd or lascivious offense committed upon or in the presence of a person less than 16 years of age; carrying, displaying, using, threatening, or attempting to use a weapon or firearm during the commission of a felony; grand theft; possessing or discharging any weapon or firearm on school property; home invasion robbery; carjacking; and grand theft of a motor vehicle).
72 *SEE* CAL. WELF. & INST. CODE § § 707(D)(D)(2) (2015).
73 BRANDED FOR LIFE, *supra* note 2, at 24.
74 *Id*.
75 *Delinquency Profile FY 2014–15*, *supra* note 16.
76 *Id*.
77 *Id*.

only three times as many arrests of boys than girls.[78] Additionally, 25.8 percent of minors transferred to criminal court are white, 60.2 percent are black, and 13.2 percent are Hispanic during the last five year period.[79]

Unfortunately, there is no reliable data on the number of non-citizen youth involved in the juvenile justice system[80] or the number of those transferred to criminal court, or transferred to criminal court through the direct file statute. The majority of jurisdictions do not formally collect or analyze these data and instead focus on racial and ethnic reporting.[81] However, according to a Bureau of Justice Statistics report the number of reported state and federal noncitizen inmates is 67,837 and inmates 17 or younger is 1,035.[82] Florida has the second highest total number of reported noncitizen inmates at 7,199 after Texas and the highest number of reported inmates 17 or younger at 126.[83]

III. JUVENILE DELINQUENCY ADJUDICATIONS ARE NOT CONVICTIONS FOR CONVICTION BASED GROUNDS OF DEPORTABILITY OR INADMISSBILITY.

The consequences of criminal convictions and juvenile adjudications can be devastating for immigration proceedings; it can make it much more difficult for a youth to obtain a visa or other legal status in order to remain in the United States.[84] The Immigration and Nationality Act (INA) lists offenses that qualify as grounds of inadmissibility or grounds

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78 *Id*.

79 *Id*.

80 SHANNAN WILBER & ANGIE JUNCK, A GUIDE TO JUVENILE DETENTION REFORM: NONCITIZEN YOUTH IN THE JUVENILE JUSTICE SYSTEM,, THE ANNIE E. CASEY FOUNDATION 1 (2014), http://www.aecf.org/resources/noncitizen-youth-in-the-juvenile-justice-system/.

81 *Id*. at 6.

82 ELIZABETH A. CARSON, PRISONERS IN 2014, U.S. DEP'T OF JUST. 1, 31 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf.

83 *Id*.

84 The types of legal relief available include (1) Asylum, INA § 208, 8 U.S.C. § 1158 (2012); (2) Special Immigrant Juvenile Status, INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012); (3) T visas for victims of human trafficking, INA § 101(a)(15)(T)(i), 8 U.S.C. § 1101(a)(15)(T)(i) (2012); (4) U visas for victims of crimes in the United States, INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U)(IV)(2012); (5) relief under the Violence Against Women Act (VAWA) for victims of domestic violence committed by a U.S. citizen or lawful permanent resident, INA §§ 204(a)(1)(A)(iv), (a)(1)(B)(iii), 8 U.S.C. §§ 1154(a)(1)(A)(iv), (a)(1)(B)(iii) (2012); (6) family-based forms of relief if the youth has relative who is a U.S. citizen or lawful permanent resident; INA §§ 201(b)(2)(A)(i), 203(a)(2), 8 U.S.C. §§ 1151(b)(2)(A)(i) (2012); 1153(a)(2) (2012); and (7) cancellation of removal, INA § 240A, 8 U.S.C. § 1229b (2012).

84 INA § 237(a), 8 U.S.C. § 1227(a) (2012) (grounds of deportability); INA § 212(a), 8 U.S.C. § 1182(a) (2012) (grounds of inadmissibility).

of deportability.[85] Inadmissibility applies to immigrants who were never lawfully admitted into the United States.[86] If an individual gained entry into the United States after inspection at a port of entry, such as a border or airport, then an individual is considered lawfully admitted.[87] However, if a person came into the country presenting herself to an immigration officer, then the person is not considered lawfully admitted.[88] If a minor is convicted of an offense listed as a ground of inadmissibility, she will be unable to apply for some types of legal relief, or to become a lawful permanent resident, unless she qualifies for a waiver.[89]

Deportability applies to immigrants who were lawfully admitted to the United States at some point in the past.[90] This means that any child who is a lawful permanent resident or has other lawful immigration status, such as a student visa or asylum, would be subject to the grounds of deportability.[91] For example, a minor who entered the country on a student visa and let that visa expire would be deportable if she stayed in the United States.[92] A youth would also be subject to deportability in in the case that she entered the country without admission and was granted some type of legal status such as asylum.[93] A minor with an adult conviction for a crime that is a ground of deportability will render that minor automatically deportable with few waivers.[94]

Most importantly, if a minor is charged as an adult and convicted of a crime, the minor faces the same immigration consequences as any non-citizen adult.[95] A juvenile delinquency adjudication is not considered a "criminal conviction" for purposes of triggering conviction-based grounds of deportability or inadmissibility under the INA.[96] In *Matter of Devison,* the Board of Immigration Appeals (BIA) held that "juvenile delinquency proceedings are not criminal proceedings, that acts of

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85 INA § 237(a), 8 U.S.C. § 1227(a) (2012) (grounds of deportability); INA § 212(a), 8 U.S.C. § 1182(a) 2012) (grounds of inadmissibility).

86 8 U.S.C. § 1182(a).

87 INA § 101(a)(13), 8 U.S.C, § 1101(a)(13) (2012).

88 *Id.*

89 INA § 212(a), 8 U.S.C.§ 1182(a) (2012).

90 8 U.S.C. §1227(a) (2012).

91 Frankel, *supra* note 22, at 88.

92 *Id*. at 89.

93 *Id*.

94 *Id*.

95 See *In re* Devison, 22 I. & N. Dec. 1362, 1370 (B.I.A. 2000).

96 *Id*.; *In re* Seda, 17 I. & N. Dec. 550, 554 (B.I.A. 1980) (establishing that admitting to a juvenile delinquency offense is not considered an admission of a criminal conviction under the INA), overruled on other grounds by *In re* Ozkok, 19 I. & N. Dec. 546, 552 (B.I.A. 1988).

juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes."[97]

Because all forms of immigration relief are considered a benefit and not a right,[98] a judge may always exercise discretion and deny that benefit even if a minor makes a showing that she qualifies for asylum, SIJS, or other types of reliefs.[99] No clear test exists as to whether a juvenile delinquency adjudication or criminal conduct committed as a juvenile will result in discretionary denial of immigration relief.[100] The BIA has held that judges may weigh negative factors such as past criminal activity, including juvenile delinquency adjudications, against positive factors such as evidence of rehabilitation and good moral character.[101] Because of the lack of representation for youth in immigration proceedings, there is no one advocating with the child in court to make arguments regarding rehabilitation and other factors that weigh in the minor's favor.[102] This means that in practice, immigration

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97 *In re* Devison, 22 I. & N. Dec. at 1370; While criminal convictions have the most serious consequences for immigration relief, other mandatory grounds of inadmissibility and deportability can be triggered by bad acts or conduct alone including some juvenile delinquency adjudications. For example, juvenile delinquency drug offenses will trigger certain conduct based grounds of removal. The most common of these is drug trafficking which creates a permanent bar to that minor obtaining lawful immigration status. The INA provides that "[a]ny alien the Attorney General knows or has reason to believe is a drug trafficker" is inadmissible and deportable. A juvenile delinquency adjudication for minor drug possession or sale has been used as evidence that the youth is involved in "drug trafficking." Nevertheless, there is a waiver if the minor can qualify for a T Visa (for victims of trafficking) or a U Visa (for victims of crime in the United States who assisted law enforcement). However, many minors do not qualify for these visas and face mandatory deportation. Many other conduct based grounds of removal include "engaging in" prostitution, alien smuggling, being a "drug addict" or "drug abuser," certain physical or mental disorders, including mental health problems where an individual may harm himself or others, violations of an order of protection, and use of false documents or other fraud offenses related to false claims of U.S. citizenship. Ann Benson, *Practice Advisory for Juvenile Defenders Representing Noncitizens*, Washington Defender Association's Immigration Project 1, 8–13 (2011).

98 I.N.A. § 240, 8 U.S.C. § 1229a(c)(4) (2012).

99 I*d.;* I.N.A. § 240B, 8 U.S.C. § 1229c(b)(1)(B) (2012).

100 Frankel, *supra* note 22, at 92.

101 *See* Wallace v. Gonzalez, 463 F.3d 135, 138–40 (2d Cir. 2006); *In re* Martinez-Velarde, No. A099 621 646 – SAL, 2010 WL 2224586, at *1 (B.I.A. 2010); *In re* Medina, No. A92 061 433, 2008 WL 1924548 (B.I.A. 2008); *In re* Taha el Kherbaoui, No. A98 344 707 – SEAT, 2007 WL 2825138 (B.I.A. 2007). *See also In re* Mendez-Moralez, 21 I. & N. Dec. 296, 301–02 (B.I.A. 1996).

102 Christopher Nugent, *Whose Children are Those? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT'L. L. J. 219, 222 (2006).

judges will often deny immigration relief based solely on a criminal conviction or even a police report without context.[103]

Furthermore, it has been difficult to find pro bono attorneys willing to take cases of youth with juvenile delinquency or criminal charges or adjudications.[104] This stems from the fact that these types of cases are more complicated and are more challenging to win given the potential immigration consequences resulting from a delinquency adjudication or criminal conviction.[105] Furthermore, clients are usually not seen as sympathetic because of their past criminal conduct.[106] More importantly, legal service providers do not have the resources to match every child in immigration custody with a pro bono attorney so these providers have an incentive to prioritize those cases where the child has a greater likelihood of success[107] which means not those with a delinquency adjudication or criminal conviction.

IV. LOCAL LAW ENFORCEMENT COOPERATION WITH ICE.

State and local officers often cooperate with ICE to transfer youth to immigration custody and once the child is in federal custody, the communication and cooperation generally ends. The degree to which state and local police have become involved in the enforcement of federal immigration law is troubling because it is largely unregulated and unchallenged. The programs designed to create these partnerships generally lack transparency, accountability, oversight, and mechanisms to ensure that the federal government's claimed enforcement priorities which is to target "serious criminal aliens" are actually carried out.

Historically, there was a clear division between the enforcement of civil immigration laws and the enforcement of criminal immigration laws.[108] Civil violations of the INA include unlawful presence, visa overstays, and working without proper employment authorization.[109] Criminal immigration law covers offenses such as human trafficking,[110] the harboring of undocumented aliens,[111] and the reentry of aliens who

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103 Frankel, *supra* note 22, at 93.
104 *Id.* at 81.
105 *Id*.
106 *Id*.
107 *Id*.
108 OFFICE LEGAL COUNSEL, DEP'T OF JUST., ASSISTANCE BY STATE AND LOCAL POLICE IN APPREHENDING ILLEGAL ALIENS,1996 OLC Lexis 76 (1996).
109 Alison Siskin, *Congressional Research Service*, IMMIGRATION RELATED DETENTION: CURRENT LEGISLATIVE ISSUES, Order Code RL32369 6 (2004).
110 *Id*.
111 8 U.S.C. § 1324(a) (2016).

were previously deported or excluded.[112] Federal authorities have held exclusive jurisdiction over the ability to regulate civil immigration laws while federal, state, and local authorities have held concurrent jurisdiction in enforcing criminal immigration laws.[113] No federal law requires state and local officials to affirmatively enforce federal immigration laws and there is no duty under federal law for state or local law enforcement officials to ask about immigration status or report noncitizens to ICE.[114]

ICE has combined the major programs that merge immigration enforcement with the criminal justice system under an umbrella labeled ICE "Agreements of Cooperation in Communities to Enhance Safety and Security" (ACCESS).[115] ACCESS encompasses 13 separate programs that allow local law enforcement agencies to partner with ICE in immigration enforcement of which two are the most significant and widespread: (1) the 287(g) program, (2) the Criminal Alien Program (CAP).[116] A third critical program, the Secure Communities Program, was replaced by the Priority Enforcement Program (PEP) in July, 2015.[117]

Through the 287(g) program, named after the section of the Immigration and Nationality Act (INA) that enacted it, local jurisdictions enter into agreements with the U.S. Department of Homeland Security allowing local law enforcement officers to enforce federal immigration law.[118] State and local agencies enter into a Memorandum of Agreement (MOA) with ICE pursuant to which law enforcement officers become deputized immigration enforcement officers.[119] These written agreements have effective erase the line between civil immigration and criminal immigration enforcement by enabling local law enforcement officers to enforce civil immigration law for the first time in U.S. history.[120] According to ICE, it has "trained and certified more than 1,500 state and

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112 8 U.S.C. § 1326 (2016).

113 *Id*.

114 *See* Michael J. Garcia & Kate M. Manuel, *Authority of State and Local Police to Enforce Federal Immigration Law*, CONGRESSIONAL RESEARCH SERVICE 1, 11 (2012).

115 *ICE Agreements of Cooperation in Communities to Enhance Safety and Security*, ICE ACCESS: FACT SHEET (2008).

116 *Id*.

117 SECURE COMMUNITIES, https://www.ice.gov/secure-communities#wcm-survey-target-id.

118 DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/factsheets/287g.

119 *Id*.

120 *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, AMERICAN CIVIL LIBERTIES UNION & IMMIGRATION & HUMAN RIGHTS POLICY CLINIC 8, 19 (2009).

local officers to enforce immigration law" and currently has 287(g) agreements with 32 law enforcement agencies in 16 states.[121] Two of those law enforcement agencies are found in Florida.[122]

The program operates through three models: the jail enforcement model, the broader task force model, and the joint or hybrid model.[123] Under the jail model, correctional officers in state prisons and local jails screen those arrested or convicted of crimes by accessing federal databases to verify a particular arrestee's immigration status.[124] Under the broader task force model, law enforcement officers participating in criminal task forces check the immigration status of arrested individuals during the course of performing their regular policing duties.[125] Under the joint model, ICE has allowed some local law enforcement agencies to implement both models.[126] As of January 15, 2016, all 32 of the MOA agreements operate under the jail enforcement model.[127]

While ICE claims that the 287(g) program is aimed at "criminal illegal alien" activity," race and ethnic profiling has had the major role in its growth and not actual crime.[128] A majority of the enforcement agencies running 287(g) programs had violent and property crimes rates lower than the national average while at the same time having a Latino population growth higher than the national average.[129] Moreover, racial profiling has been widespread in communities with the 287(g) program. For example, an investigation by the DOJ concluded that the Maricopa County, Arizona Sheriff's Office engaged in a pattern and practice of constitutional violations, including racial profiling of Latinos, after entering its 287(g) MOA.[130] A separate DOJ investigation concluded that the Alamance County, North Carolina Sheriff's Office engaged in a

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121 *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/factsheets/287g.

122 *Id*.

123 *Id*.

124 *Id*.

125 *Id*.

126 *Id*.

127 *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/factsheets/287g.

128 IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, *The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement* (2012).

129 Aarti Shahani & Judith Greene, *Local Democracy on Ice: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*, JUSTICE STRATEGIES (2009).

130 *Letter from the Assistant Att'y Gen Thomas E. Perez*, UNITED STATES' INVESTIGATION OF THE MARICOPA COUNTY SHERIFF'S OFFICE (2011).

pattern and practice of constitutional violations by unlawfully detaining and arresting Latinos.[131]

Additionally, a report issued by the American Civil Liberties Union (ACLU) and the Immigration Human Rights Policy Clinic at the University of North Carolina found that 287(g) partnerships have been used to purge towns and cities of "unwelcomed" immigrants.[132] For example, in the month of May 2008, eighty-three percent of the immigrants arrested by Gaston County ICE-authorized officers pursuant to the 287(g) program were charged with traffic violations.[133] The report makes it clear that the 287(g) program often serves to enforce local practices of racism and bigotry: Johnson County Sheriff Steve Bizzell acknowledged that his goal was to reduce, if not eliminate, the immigrant population of Johnson County through the program.[134] Sheriff Bizzell stated that immigrants are "breeding like rabbits," and that they "rape, rob and murder American citizens."[135] Through these MOA agreements, officers like Sheriff Bizzell have the resources and unchallenged authority to act on their discriminatory sentiments which cultivates the illegal activity of racial profiling.[136] This fosters the potential for youth in the juvenile justice system to be reported to ICE in efforts to get rid of what is seen as undesirable criminals, especially those with adult criminal convictions.

The Criminal Alien Program (CAP) is ICE's longest running and most extensive local federal partnership programs.[137] Nearly half of the admissions and the average daily population in ICE custody during fiscal year 2009 were identified through the CAP program.[138] The current version of the program was created through the merger of the Institutional Removal Program and the Alien Criminal Apprehension

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131 *Letter from the Assistant Att'y Gen Thomas E. Perez*, UNITED STATES' INVESTIGATION OF THE ALAMANCE COUNTY SHERIFF'S OFFICE (2012).

132 *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, AMERICAN CIVIL LIBERTIES UNION & IMMIGRATION & HUMAN RIGHTS POLICY CLINIC 8 (2009).

133 *Id*. at 29.

134 *Id*. at 30.

135 Kristin Collins, *Tolerance Wears Thin*, NEWS & OBSERVER (2008), http://www.newsobserver.com/news/nation-world/article18576803.html.

136 *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, AMERICAN CIVIL LIBERTIES UNION & IMMIGRATION & HUMAN RIGHTS POLICY CLINIC 8, 30 (2009).

137 *ICE Agreements of Cooperation in Communities to Enhance Safety and Security*, ICE ACCESS: FACT SHEET (2008).

138 Dora Schriro, *Immigration Detention Overview and Recommendations*, U.S. DEP'T OF HOMELAND SECURITY 12 (2009).

Program in 2004.[139] CAP focuses on identifying criminal aliens who are incarcerated within federal, state, or local prisons and jails and is administered by the ICE Office of Detention and Removal Operations (DRO), which assigns officers to these facilities.[140] Law enforcement agencies notify ICE of foreign born detainees in their custody based on information obtained during the booking process.[141]

Usually the process starts when a state or local facility collects place of birth information from the arrestee in order to secure funding for the federal State Criminal Alien Assistance Program (SCAAP), administered by the Bureau of Justice Assistance.[142] Florida had the fourth highest SCAAP award in FY 2015 after California, New York, and Texas.[143] The program provides reimbursements to state and localities that incurred costs for incarcerating undocumented criminal aliens with at least one felony or two misdemeanor convictions for a period of at least four days.[144] After law enforcement agencies have notified ICE of foreign born detainees, DRO officers then interview inmates to determine whether to lodge a detainer or immigration hold against the individual.[145] These immigration holds notify the jail or prison that ICE intends to take custody of the noncitizen upon release and requests that ICE be notified before such release.[146] After an immigration hold or detainer is placed, the local jail or prison may then hold the individual for an additional time period which is not to exceed 48 hours per federal regulation,[147] until ICE can assume custody.[148] While minors are usually referred to ICE through juvenile detention personnel, in some jurisdictions, prosecutors and courts may alert ICE at any time in the course of juvenile proceedings.[149]

This process has been made easier by ICE's transition from actual, physical presence in jails and prisons to remote, telephonic presence through its Detention Enforcement and Processing Offenders by Remote

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139 *Fact Sheet: Secure Communities*, Office of Public Affairs, U.S. Dep't of Homeland Security (2008).

140 *Id*.

141 *State Criminal Alien Assistance Program*, BUREAU OF JUSTICE ASSISTANCE (2009).

142 *Id*.

143 *State Criminal Alien Assistance Program Awards: FY 2015* (2015).

144 *State Criminal Alien Assistance Program*, BUREAU OF JUSTICE ASSISTANCE (2009).

145 *Id*.

146 *Id*.

147 8 C.F.R. § 287.7 (2013).

148 STATE CRIMINAL ALIEN ASSISTANCE PROGRAM, BUREAU OF JUSTICE ASSISTANCE (2009).

149 Shannan Wilber & Angie Junck, *A Guide to Juvenile Detention Reform: Noncitizen Youth in the Juvenile Justice System*, JUVENILE DETENTION ALTERNATIVES INITIATIVE, THE ANNIE E. CASEY FOUNDATION 1, 22 (2014).

Technology (DEPORT) Center based in Chicago, Illinois starting in 2006.[150] With DEPORT, DRO officers assigned to the Center conduct interview of inmates remotely and process them through CAP.[151] The DEPORT Center screens and process alien detainees at 87 Bureau of Prisons (BOP) facilities.[152] Furthermore, ICE assesses the risk of all federal, state, and local prisons, which classifies facilities into four tiers: Tier 1 includes facilities considered to represent the highest risk to national and community safety and Tier 4 representing the lowest risk with the middle tiers somewhere in between.[153] According to ICE, all Tier 1 and 2 facilities have hundred percent CAP screening with the goal that eventually the program will operate in one hundred percent of all nationwide facilities.[154] This type of increased cooperation makes it easier for juveniles in the criminal justice system, particularly those with adult convictions, to be detained through CAP screening which raises serious civil rights concerns.

A report by The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity which analyzed data obtained from operation of CAP in Irving, Texas, concluded that ICE "is not following Congress' mandate to focus resources on the deportation of immigrants with serious criminal histories."[155] In Irving, felony charges accounted for only two percent of the ICE detainers issued during a 15 month time period while 98 percent of detainers were issued for misdemeanors in the same time period.[156] The report concluded: "[t]his study offers compelling evidence that the Criminal Alien Program tacitly encourages local police to arrest Hispanics for petty offenses."[157] CAP allows local law enforcement officers to use the program as an opportunity for immigration screening: any arrest regardless of the seriousness of the charge or whether the arrest was pretextual (e.g., race profiling) will trigger the program's use. The Warren Institute Report documents a significant rise in Class-C misdemeanor arrests that correlate with a shift in ICE policy from in-person consultation to 24-7 access via phone or teleconference through the DEPORT Center in April of 2007.[158] This means that CAP does not

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150 FACT SHEET: SECURE COMMUNITIES, OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF HOMELAND SECURITY 3 (2008).

151 *Id*.

152 *Id*.

153 *Id*.

154 *Id*.

155 Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the Ice Criminal Alien Program*, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY 1 (2009).

156 *Id*. at 7.

157 *Id*. at 3.

158 *Id*. at 4.

focus its resources on serious offenses and instead focuses mostly on misdemeanors for which juveniles can be transferred to criminal court through the direct file statute.

During a twenty one month period between 2006 and 2008, the DEPORT Center lodged 11,000 detainers.[159] In Miami-Dade County, ICE issued 3,262 detainers to Miami-Dade Corrections and Rehabilitation Department in 2011 and the majority (57%) involved inmates not charged with felonies; in 2012 the percentage rose to 61 percent.[160] This great number of detainers issued under CAP authority[161] creates another problem; the effect it can produce on release on bond or access to diversion programs.[162] For example, in Travis County, Texas, this meant that the incarceration period for individuals with a detainer was significantly longer: the average length of stay for incarcerated inmates in 2007 was 21.7 days for all offenses; for those with an ICE detainer, it was 64.6 days for all offenses.[163] The Miami-Dade Commission ended county funded immigration detainers in 2013.[164]

The final significant ICE ACCESS program working as a federal-local joint immigration enforcement program was Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens.[165] On November 20, 2014, President Obama announced executive actions to change some aspects of the immigration system including discontinuing Secure Communities and replacing it with Priority Enforcement Program (PEP).[166] Secure Communities allowed for the instantaneous sharing of information among local jails, ICE, and the FBI.[167] The significant aspect of the Secure Communities program was that during booking in jail or

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159 *Fact Sheet: Secure Communities*, OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF HOMELAND SECURITY (2008).

160 *Resolution Directing the Mayor or Mayor's Designee to Implement Policy on Responding to Detainer Requests from the United States Department of Homeland Security Immigration and Customs Enforcement*, CLERK OF THE BOARD OF COUNTY COMMISSIONERS (2013).

161 *Fact Sheet: Secure Communities*, OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF HOMELAND SECURITY (2008).

162 Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL 6 (2010).

163 *Id*. at 12.

164 Miami-Dade County Commissioner Sally A. Heyman, *Miami-Dade Commission ends County-funded immigration detention* (2013).

165 *ICE Agreements of Cooperation in Communities to Enhance Safety and Security*, ICE ACCESS: FACT SHEET (2008).

166 *Memorandum from Sec'y Jeh C. Johnson*, U.S. DEPARTMENT OF HOMELAND SECURITY, SECURE COMMUNITIES (2014).

167 *Fact Sheet: Secure Communities*, OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF HOMELAND SECURITY (2008).

prison, the arrestees' fingerprints were checked against Department of Homeland Security databases, and not against FBI criminal databases.[168] This remains unchanged in the PEP program.[169] The system then would notify ICE and the local law enforcement officers when there was a "hit" which generally resulted in ICE lodging a detainer or immigration hold against the arrestee.[170]

Instead of lodging a detainer against the detainee, ICE handles this process in the PEP program by requesting for notification: a request that the local agency notify ICE of a pending release during the time the person is in custody under state or local authority.[171] In "special circumstances" ICE may issue a request for detention if the person has a final removal order or "there is other sufficient probable cause to find that the person is a removable alien."[172] However, the "special circumstances" provision is not defined in the memorandum[173] and also does not require a judicial determination of probable cause which leaves wide discretion for ICE to make the determination as to what a special circumstance might be. Regarding enforcement priorities, DHS instructed ICE to prioritize enforcement according to a memo on prosecutorial discretion issued in 2011.[174]

The memorandum lays out a list of factors to consider in deciding whether to pursue deportation that includes: the person's criminal history (arrests, prior convictions, or outstanding arrest warrants), the person's age (with particular consideration given to minors and the elderly).[175] This means that juveniles should be given a slightly favorable treatment because of their age but those with adult criminal convictions face obstacles as a person's criminal history is one of the most important factors considered.[176] These factors make it imperative that the direct file statute should be removed because it places youth that could have had more favorable treatment in deportation proceedings at a significant disadvantage. The memo also suggests that ICE focus resources on

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168 *Id*.

169 *Priority Enforcement Program*, OFFICE OF ENFORCEMENT AND REMOVAL OPERATIONS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (2014).

170 *Fact Sheet: Secure Communities*, OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF HOMELAND SECURITY 5 (2008).

171 *Priority Enforcement Program*, OFFICE OF ENFORCEMENT AND REMOVAL OPERATIONS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (2014).

172 *Id*.

173 *Memorandum from Sec'y Jeh C. Johnson*, U.S. DEPARTMENT OF HOMELAND SECURITY, SECURE COMMUNITIES (2014).

174 *Memorandum from John Morton*, OFFICE OF THE DIRECTOR, U.S. DEPARTMENT OF HOMELAND SECURITY (2011).

175 *Id*. at 4.

176 *Id*.

certain categories of people such as "known gang members" and "serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind."[177] Under the PEP, the factors are similar to its predecessor but are divided into three levels of priorities starting with priority 1 (threats to national security, border security, and public safety); priority 2 (misdemeanants and new immigration violators); and priority 3 (other immigration violations).[178]

Despite the change, the stated goal of each of these programs is still to target the most "dangerous criminals," data from the 287(g), CAP, and PEP programs document.[179] In practice, the majority of individuals of individuals targeted are identified because of their race or ethnicity and for crimes which do not pose a serious risk to public safety.[180] For instance, A Human Rights Watch report found that between 1997 and 2007, seventy two percent of people deported whom ICE labels "criminal aliens" were removed for nonviolent offenses.[181] This is particularly salient for juveniles with adult convictions that are transferred to criminal court not only from violent offenses but mostly misdemeanors due to the discretionary nature of the statute.[182]

This cooperation between local and state law enforcement at identifying undocumented immigrants in law enforcement custody is alarming for juveniles with adult criminal convictions given the fact that there is not much cooperation after a state court releases a juvenile or ICE takes the minor into custody. A state court's decision to release a youth has no effect on ICE's decision because if ICE has placed a detainer on a child through programs like 287(g), CAP, and PEP, the minor will generally be taken into custody.[183] In other words, youth who have already served sentences in the state system may be held in immigration custody longer than they spent serving their original sentences.[184]

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177 *Id*. at 5.

178 *Memorandum from Sec'y Jeh C. Johnson, U.S. Department of Homeland Security*, POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS 3–4 (2014).

179 *ICE Agreements of Cooperation in Communities to Enhance Safety and Security*, ICE ACCESS: FACT SHEET (2008).

180 *See, e.g.*, Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL (2010).

181 HUMAN RIGHTS WATCH, *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses* (2009).

182 § 985.557, Fla. Stat. (2015).

183 8 C.F.R. § 287.7 (2011).

184 Frankel, *supra* note 22, at 82–83.

Even if a minor has a pending criminal or juvenile delinquency case, immigration authorities can transfer youth out of state because of the limited placement options[185] resulting in detrimental legal consequences. For example, state court judges are often not informed when the minor has been transferred to the custody of ice which can result in the issuance of a warrant or default order against the youth for failure to appear in court.[186] The consequences here are that if the minor is released from immigration custody, then she might be picked up again by state authorities.[187] Furthermore, a child in federal custody are also unable to comply with probation requirements which means that if released from immigration custody they could be taken back into state custody for probation violations.[188] Additionally, despite the cases where the state or juvenile court judge has been informed that the minor has been placed in immigration detention, and the judge stays proceedings until the child is released, youth may be taken back into state custody to serve a sentence once the criminal or juvenile delinquency case is adjudicated.[189]

If a child is in federal custody, she is unable to access benefits available through the state legal system.[190] For example, in order to obtain Special Immigrant Juvenile Status (SIJS) a child must obtain an order from the state court finding that the child was abused, abandoned, or neglected by one or both parents and it is not in the child's best interest to be returned to her country of origin.[191] However, in some states such as Florida, a minor in federal custody is unable to get into state court to obtain the necessary order either because they need the department or community-based care provider to petition for them[192] or because the state court will not declare a youth in federal custody a dependent on the state.[193] If a child cannot get released from immigration custody before turning eighteen, she will lose the opportunity to apply for SIJS in Florida because the state laws does not grant the requisite dependency or predicate order after the child turns eighteen.[194] These types of problems might be mitigated if the cooperation between local

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185 Women's Refugee Comm'n & Orrick Herrington & Sutcliffe LLP, *Halfway Home: Unaccompanied Children in Immigration Custody* 14 (2009).

186 Frankel, *supra* note 22, at 83.

187 *Id*.

188 Susan Terrio et al., *Voice, Agency and Vulnerability: The Immigration of Children through Systems of Protection and Enforcement*, 49 INT'L MIGRATION 1, 8-10 (2011).

189 *See, e.g.*, § 985.24, Fla. Stat. (2015).

190 Frankel, *supra* note 22, at 83.

191 INA § 101(a)(27)(J), 8 U.S.C.A. § 1101(a)(27)(J) (West 2010); Trafficking Victims Protection Reauthorization Act § 235(d), 8 U.S.C. § 1232(d) (2008).

192 § 39.5075(4), Fla. Stat. (2015).

193 Frankel, *supra* note 22, at 83.

194 § 39.5075(6), Fla. Stat. (2015).

law enforcement and immigration authorities through programs like ICE ACCESS did not encompass juveniles who have adult criminal convictions as a result of the direct file statute in Florida.

V. CONCLUSION

While removing the direct file statute in Florida would not end the potential of some children with criminal convictions or delinquency adjudications, the numbers will be greatly reduced which could allow for the potential of needed legal representation through the pro bono model. The consequences of no legal representation for these undocumented youth are often spending longer periods of time in detention and some eventually giving up on legal claims seeking instead removal to be able to get out of custody.[195] If fewer children were transferred to adult court as a result of the direct file statute, then cases would be more attractive to pro bono attorneys because a criminal conviction would not make cases more complicated.

The competing interests of the state and federal systems in regards to undocumented juveniles involved in both state and federal custodial and legal systems creates a series of problems that exacerbate the need to rethink the direct file statute in Florida and reexamine the partnerships between state and local enforcement and immigration officials.

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[195] Women's Refugee Comm'n & Orrick Herrington & Sutcliffe LLP, *Halfway Home: Unaccompanied Children in Immigration Custody* 7 (2009).